

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

EDWIN ORTIZ-FIGUEROA,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 13-1154 (JAF)

(Crim. No. 95-cr-29-36)

I.

Background

15 Ortiz, along with codefendants, was tried before a jury beginning on
16 November 17, 1997. (Crim. No. 95-cr-29, Docket No. 1917.) He was charged with
17 conspiracy to possess with intent to distribute cocaine base, cocaine, and heroin in
18 violation of 21 U.S.C. §§ 841, 846; using and carrying a firearm during and in relation to
19 a drug conspiracy in violation of 18 U.S.C. § 924(c); conspiracy to kill while engaged in
20 a drug conspiracy in violation of 21 U.S.C. §§ 846, 848(e)(1)(A); and intentionally
21 killing or attempting to kill while engaged in a drug conspiracy in violation of 18 U.S.C.

1 § 2 and 21 U.S.C. §§ 846, 848(e)(1)(A). He was also charged with liability for
2 conspiracy under Pinkerton v. United States, 328 U.S. 640 (1946). U.S. v. Collazo-
3 Aponte, 216 F.3d 163, 174 (2000). On February 16, 1998, the jury returned guilty
4 verdicts as to all defendants on all counts. We sentenced Ortiz to concurrent terms of life
5 imprisonment on multiple counts and to a consecutive ten-year term on Count 65, the
6 firearms charge. Id.

7 On July 2, 1998, Ortiz filed a notice of appeal. (Crim. No. 95-cr-29, Docket
8 No. 2340.) On June 27, 2000, the First Circuit affirmed Ortiz's conviction and sentence.
9 Collazo-Aponte, 216 F.3d at 207. On July 12, 2001, Ortiz motioned the court to vacate
10 his sentence under 28 U.S.C. § 2255. (Crim. No. 95-cr-29, Docket No. 2893.) On
11 November 25, 2003, we summarily dismissed his petition. (Crim. No. 95-cr-29, Docket
12 No. 3275.) On February 28, 2008, Ortiz moved the court for retroactive application of
13 the sentencing guidelines to his crack cocaine offense under 18 U.S.C. § 3582. (Crim.
14 No. 95-cr-29, Docket No. 3197.) On October 28, 2008, we denied Ortiz's motion for
15 retroactive application of the sentencing guidelines. (Crim. No. 95-cr-29, Docket
16 No. 3347.) On January 12, 2009, Ortiz filed a notice of appeal. (Crim. No. 95-cr-29,
17 Docket No. 3400.) On June 30, 2009, the First Circuit summarily affirmed our ruling,
18 stating that "the denial of a reduction was not error." (Crim. No. 95-cr-29, Docket
19 No. 3401.) The First Circuit stated that Ortiz's sentence "was based on the cross-
20 reference to murder under the guidelines [and therefore] the United States Sentencing
21 Commission cocaine base amendments do not render him eligible for a reduction of
22 sentence." (Id.)

23 On January 31, 2013, Ortiz filed the instant petition as a Rule 35 motion. (Crim.
24 No. 95-cr-29, Docket No. 3597.) We ordered that it should be treated as a petition under

1 28 U.S.C. § 2255. (Crim. No. 95-cr-29, Docket No. 3601.) On February 22, 2013, Ortiz
2 re-filed his motion as one to vacate, set aside or correct his sentence under 28 U.S.C.
3 § 2255. (Docket No. 1.) On April 12, 2013, the United States filed a response in
4 opposition to Ortiz's motion. (Docket No. 3.) On May 9, 2013, Ortiz filed a
5 supplemental motion to amend his motion to vacate, set aside, or correct the sentence.
6 (Docket No. 4.)

7 **II.**

8 **Legal Standard**

9 Before filing a second or successive motion under Section 2255, a defendant
10 "shall move the appropriate court of appeals for an order authorizing the district court to
11 consider the application." 28 U.S.C. § 2244(b)(3)(A); see also, 28 U.S.C. § 2255 ("A
12 second or successive motion must be certified as provided in section 2244 by a panel of
13 the appropriate court of appeals...."). A district court lacks jurisdiction over a second or
14 successive petition unless the defendant obtains certification from the appropriate court
15 of appeals. Trenkler v. United States, 536 F.3d 85, 96 (1st Cir. 2008). Ortiz submitted
16 his first motion under Section 2255 on July 12, 2001, and we dismissed that motion on
17 November 25, 2003. (Crim. No. 95-cr-29, Docket Nos. 2893, 3275.) Ortiz has not
18 obtained certification from the First Circuit to file a successive petition and, therefore, we
19 lack jurisdiction to rule on this motion.

20 **III.**

21 **Certificate of Appealability**

22
23 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever
24 issuing a denial of § 2255 relief we must concurrently determine whether to issue a
25 certificate of appealability ("COA"). We grant a COA only upon "a substantial showing

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1 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing,
2 “[t]he petitioner must demonstrate that reasonable jurists would find the district court's
3 assessment of the constitutional claims debatable or wrong.” Miller-El v. Cockrell, 537
4 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While
5 Ortiz has not yet requested a COA, we see no way in which a reasonable jurist could find
6 our assessment of his constitutional claims debatable or wrong. Ortiz may request a
7 COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 22.

V.

Conclusion

10 For the foregoing reasons, we hereby **DENY** Ortiz's § 2255 motion (Docket
11 No. 1). Pursuant to Rule 9 of the Rules Governing § 2255 Proceedings, summary
12 dismissal is in order because Ortiz must obtain an order from the court of appeals before
13 we can consider a second petition under § 2255.

14 IT IS SO ORDERED.

15 San Juan, Puerto Rico, this 8th day of January, 2014.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
U. S. DISTRICT JUDGE